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IN THE

Supreme Court of the United States

October Term, 1948

No. 333

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, an unincorporated association,

Petitioner,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a corporation,

Respondents.

BRIEF OF RESPONDENT LOCKHEED AIRCRAFT CORPORATION, A CORPORATION

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Statutes Involved

The pertinent provisions of the Selective Training and Service Act of 1940, 54 Stat. 890 (1940) as amended, 58 Stat. 799 (1940) (50 U. S. C. A. App. Sec. 301, *et seq*), provide as follows:

Sec. 8(b)—"In the case of any such person, who, in order to perform such training and service (in the armed forces), has left or leaves a position other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

. . . "

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . ."

Sec. 8(c)—"Any person who is restored to a position in accordance with the provisions of paragraph (A) and (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of senority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees

on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

The Service Extension Act of 1941, as amended (50 U. S. C. A. App. Sec. 357), as relevant hereto provides as follows:

> Sec. 7.—"Any person who, subsequent to May 1, 1940, and prior to the termination of the authority conferred by section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of section 8 of the Selective Training and Service Act of 1940, as amended."

Statement of the Case.[1]

Respondents James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, prior to their respective entrances into the armed forces in 1944 and 1945, were employed by respondent Lockheed Aircraft Corporation as Field and Service Mechanics. Although membership in the Union[2] was not a condition of such employment, veterans Joplin and Kirk have been members of the Union since 1943, and veteran Campbell was a member from November 2, 1942, until March 1, 1946 [R. 97-98]. At the time the

[1] The facts appear in two stipulations, one written [R. 97-107] and one oral [R. 125-126].

[2] In the interest of brevity, intervenor and petitioner Aeronautical Industrial District Lodge 727 is hereinafter referred to as "the Union."

Veterans[3] terminated their employment to enter the armed forces, there was in effect between Lockheed and the Union a collective bargaining agreement dated September 15, 1941 (hereinafter called the "1941 Agreement"), which agreement remained in effect until June 4, 1945. So far as is here pertinent the 1941 Agreement provided that each employee's seniority accumulated from the date of his original hire [R. 22], and further provided in Section 5 of Article III thereof as follows:

> "In case of a slack in production, layoffs are to be made primarily on the basis of the principle of seniority. Due consideration will be given, however, to (a) knowledge, ability, skill and efficiency, and (b) department record and other factors. . . ." [R. 23-24.]

On receiving an honorable discharge from the armed services, each of the Veterans applied for reemployment with, and was reemployed by, Lockheed as a Field and Service Mechanic.

Within a year after their being so reemployed, Lockheed found it necessary to conduct a general layoff in the Field and Service Mechanic occupation, and in the course thereof each of the Veterans was laid off, although Lockheed continued to retain in active employment in said occupation a nonveteran Union Chairman with less seniority than any of the Veterans.

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[3]For purposes of convenience and in order to avoid any confusion in designating the various parties herein, the respondents James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk will hereinafter be referred to as "the Veterans"; respondent Lockheed Aircraft Corporation will be referred to as "Lockheed."

The retention of a Union Chairman junior in seniority to each of the Veterans resulted from Lockheed's adherence to Sections 3(A) and 3(D), Article IV of the collective bargaining agreement dated June 4, 1945 (hereinafter called the "1945 Agreement") [R. 60-61]. The 1945 Agreement which was executed while each of the Veterans was on active duty with the armed forces was similar to the 1941 Agreement in its definition of seniority, but with respect to layoff provisions the 1945 Agreemen radically altered the procedures under the 1941 Agreement inasmuch as the 1945 Agreement granted top "seniority" or "super-seniority" to Union Chairmen in their respective occupations. In this respect the 1945 Agreement provided as follows:

> Section 3(A) of Article IV—"General Layoff Procedure. Layoffs shall be made in order of Company-wide senority applied by occupation where ability, skill and efficiency[4] are substantially equal. However, in the case of employees with four years' or more seniority, the Company may, in its discretion, retain them in order of their Company-wide seniority, regardless of occupation, where ability, skill and efficiency are substantially equal. Any claim of unjust discrimination in the exercise of such discretion may be taken up as a grievance. Employees who have not acquired seniority rights may be laid off without regard to relative length of service.
>
> "The word 'occupation' as used herein, includes all grades and leadmen within an occupation."

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[4]It is agreed by all parties to the within action that the knowledge, training, ability, skill and efficiency of each of the Veterans was substantially equal to that of the non-veteran Union Chairman retained and that each of the Veterans was capable of performing the work of said non-veteran Union Chairman. [R. 106.]

Section 3(D)—"Top Seniority for Union Chairmen for Purpose of Layoffs. For the purpose of applying the Temporary and General Layoff procedure, Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen. If the application of the General Layoff Procedure will result in the retention of more of such Chairmen in a group or department than are provided for in Article II, Section 2 of this Agreement, the Company shall prepare and furnish to the Union a list of all Chairmen in the locations where the surplus exists. The Union shall upon request of the Company promptly designate the Chairmen who are to remain in that capacity, and the Chairmen not to be retained as Chairmen shall be governed by the seniority rules applicable to the layoff of other employees. During a Temporary Layoff and during the period between the first and second steps in an Emergency Reduction of the Working Force, the terms of office of laid-off Union Chairmen shall be deemed to continue.", [R. 60-62.]

Both the 1941 and 1945 Agreements contained provisions wherein the Union and Lockheed mutually acknowledged the obligations of Lockheed to reemploy its returning veterans. Section 5, Article IV of the 1941 Agreement provided that an employee entering the military service

"shall be granted leave of absence covering the period of time in which he may be thus engaged in Government service without loss of seniority rights. Upon the termination of such Government service, if within

forty-five (45) days[*] such employees shall request re-employment and if the employees are physically and mentally able to do the work available, the Company agrees to re-employ such persons in preference to all other persons in their occupations with less seniority." [R. 27-28.]

Section 6 of Article IV of the 1945 Agreement states:

"Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be re-employed by the Company in accordance with the provisions of the Selective Training and Service Act of 1940, as such Act may be amended." [R. 63.]

The Veterans protested their layoff claiming they had not been restored to their former positions without loss of seniority and that they had been improperly laid off [R. 9, 88]. Within approximately three weeks after the layoff the Veterans were recalled to work as Field and Service Mechanics but were not reimbursed for the wages lost during the period of their layoff.

On November 27, 1946, the present action was instituted in the District Court to recover such wages. Lockheed answered the Veterans' complaint on December 13, 1946, denying liability [R. 89-91]. The Union petitioned for, and was given permission to, intervene as an added respondent and to file a separate answer [R. 92-96].

Judgment was entered in favor of the Veterans against Lockheed for wages lost during their layoff [R. 113-114].

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[*]The forty five (45) day period within which the Veteran must make application to be entitled to reemployment (54 Stat. 890 [1940]) was by an amendment in 1944, 58 Stat. 798, extended to ninety (90) days.

and the Union alone appealed to the Circuit Court of Appeals for the Ninth Circuit from said judgment [R. 111-115]. The Circuit Court of Appeals affirmed [R. 132-135].

Statement of the Position of Lockheed Aircraft Corporation.

Upon the intervention of the Union in this action, the Union and the Veterans became the true parties in interest, and although Lockheed is named as a respondent in this action, it deems its part herein to be in reality that of *amicus curiae* and submits this brief from that standpoint.

The position taken by the Veterans at the time of their layoff in demanding reinstatement and reimbursement of wages lost during their layoff necessitated a determination by Lockheed as to whether Section 3(D), Article IV of the 1945 Agreement, granting Union Chairmen top seniority in the event of a general layoff regardless of their actual seniority, contravened the reemployment provisions of the Selective Training and Service Act of 1940, as amended, *supra*.

The importance of this decision cannot be lightly minimized for Lockheed had reemployed in excess of 6000 veterans during the preceding two years and was at that time faced with the necessity of making major reductions in its working forces.

Furthermore, the necessity for such a decision obviously placed Lockheed in a serious dilemma for in the event it complied with the provisions of Section 3(D) of Article IV of the 1945 Agreement and granted Union Chairmen top or "super-seniority" when conducting a general lay-

off, Lockheed would be faced with an action by each and every veteran laid off in an occupation in which a veteran or non-veteran Union Chairman with less seniority was retained, if the veteran had entered the armed forces subsequent to the date of the 1941 Agreement and had been reemployed and had not completed his first year of reemployment after the execution of the 1945 Agreement. Conversely, if Lockheed concurred in the position advanced by the Veterans, it subjected itself to possible grievances and actions by the Union for failure to comply with the 1945 Agreement. The reality of this dilemma is indicated, first, by the fact that many such grievances were filed by the Union and secondly, by the intervention of the Union in this action.

Lockheed eventually concluded, after carefully reviewing all decisions and opinions then available on the question of veteran's reemployment rights, that the position taken by the Veterans was correct.

See:

Fishgold v. Sullivan Drydock & Repair Corporation, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 963;

DeMaggio v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases p. 70072 (D. C., N. J., 1946);

Gauweiler v. Elastic Stop Nut Corp., 69 Fed. Supp. 294;

Koury v. Elastic Stop Nut Corp., 11 C. C. H. Labor Cases p. 70071 (D. C., N. J., 1946).

Accordingly, Lockheed recalled each of the Veterans herein and reinstated him in his respective former position—Campbell and Joplin on July 15, 1946, and Kirk on July 16, 1946 [R. 107].

Since that time Lockheed has consistently followed the policy of retaining in their respective occupations for the full period of their reemployment year all veterans who were inducted or enlisted in the military service while the 1941 Agreement was in effect when the occupational seniority rosters disclose that there is, in the veteran's occupation, a Union Chairman with less seniority than the veteran's. However, to avoid a possible double monetary liability which might result to Lockheed if it reimbursed the Veterans herein and its interpretation of the Act was determined to be incorrect, Lockheed denied the claims of the Veterans for reimbursement for loss of wages they sustained during their layoff.

This policy followed by Lockheed since the reinstatement of the Veterans here involved, is consistent with the decision of the court below and Lockheed believes such decision to be correct as a matter of law.

See:

Trailmobile Co. v. Whirls, 331 U. S. 40, 67 Sup. Ct. 982, 91 L. Ed. 939;

Spearmon v. Thompson, 8 Cir., 167 F. 2d 626;

Rudisill v. Chesapeake & Ohio Ry. Co., 4 Cir., 167 F. 2d 175;

Dwyer v. Crosby Co., 2 Cir., 167 F. 2d 567;

Foor v. Torrington Co., 7 Cir., 170 F. 2d 487.

It is respectfully submitted that the judgment below should be affirmed.

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